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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 657

JEROME M. NEY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 10-15) is reported at 77 F. Supp. 1005. The opinion of the Court of Appeals (R. 112-121) is reported in 171 F. 2d 449.

JURISDICTION

The judgment of the Court of Appeals was entered December 24, 1948. (R. 122.) The petition for a writ of certiorari was filed March 19, 1949.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the courts below erred in holding that living expenses incurred by the taxpayer in order to maintain a residence in Washington, D. C., while employed by the Federal Government, and while continuing to maintain a residence at Fort Smith, Arkansas, where he was domiciled and where was located the department store corporation of which he continued, during his Government employment, to be president, are not deductible under Section 23(a)(1) of the Internal Revenue Code as traveling expenses while away from home, or under Section 23(a)(2) as expenses incurred for the production of income

STATUTES AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*, pp. 10-13.

STATEMENT

The facts as found by the District Court (R. 11-13) may be summarized as follows:

The taxpayer is a resident of Fort Smith, Arkansas. He was employed by the Office of Price Administration from July 1, 1942, until December 21, 1945. During all this time he maintained his home and family in Fort Smith and was president and general manager of the Boston Store Dry Goods Company, an Arkansas corporation which operates a department store at Fort Smith,

Arkansas, and retail dry goods stores and specialty stores in other cities along with a wholly owned subsidiary in Texas. (R. 11.)

The taxpayer first accepted employment with the Office of Price Administration at the request of the Regional Administrator in Atlanta, Georgia, upon the understanding that the work would be of short duration. (R. 11.) At the beginning and for several months thereafter the taxpayer's post of duty was Atlanta, Georgia. He was then sent to Washington and that was his post of duty during the remainder of the employment. During such employment he did some traveling in connection therewith, but the usual per diem and transportation expenses were paid by the Office of Price Administration and are not involved here. (R. 13.)

The ability and experience of the taxpayer was such as to make his employment by the Office of Price Administration desirable and while in the beginning it was thought that his services might be dispensed with in a few months, he was persuaded to remain for the period of the war emergency and instead of being temporary it became of indefinite or indeterminate duration. (R. 13.)

He did not desire the employment but accepted it as a duty during the war emergency with the understanding that he would be free to confer with his associates in his private business as often as necessary by telephone, telegraph or in person. He did maintain such contacts and continued to

direct his private business through such conferences and by personal visits to Fort Smith, Arkansas, of three or four days during every six, seven or eight weeks period. During the time other executives in the private business would visit him at Washington, D. C., and he often spent weekends with his buyers and associates in New York City where they were required to go in connection with the business of the Boston Store Dry Goods Company. (R. 12.)

The taxpayer continued to receive a salary from his private business and also a salary for his work with the Office of Price Administration. The salaries for such time were as follows (R. 12):

	1942	1943	1944
Boston Store	\$14,550.00	\$19,150.00	\$16,550.00
Rosenthal's	3,775.00	2,525.00	3,900.00
O.P.A.	2,162.79	5,563.50	7,829.15

In his returns he claimed deductions, which were allowed, from the income received from his private business for money spent for entertainment, travel, and telephone for all three years as follows: 1942 the sum of \$910; 1943 the sum of \$1,080; and 1944 the sum of \$1,032.50. (R. 12.)

In making and filing his original income tax returns for those years, taxpayer did not claim a deduction for reasonable and necessary traveling expenses, including meals and lodging while away from his home in pursuit of a trade or business (his employment by the Office of Price Adminis-

tration) but he filed claims for refunds for taxes paid for the calendar years 1943 and 1944. These claims for refund were based upon the claim for further deductions for "living expenses incurred by reason of having to maintain separate residence in (Atlanta, Georgia, and) Washington, D. C., as a result of being employed by Office of Price Administration". (R. 12-13.)

The employment of the taxpayer by the Office of Price Administration was such as to require him to live in Atlanta while assigned to the regional office in that city and to live in Washington while assigned to the main office. His family continued to live in Fort Smith in the home provided by the taxpayer and to which he returned as often as the employment permitted. The deductions claimed were the personal living expenses incurred by reason of his employment and the necessity for him to remain or live at his post of duty several hundred miles from his established residence and family that remained at all times in Fort Smith, Arkansas. (R. 13.) These expenses were disallowed by the Commissioner of Internal Revenue (R. 93-101) whose determination was upheld by the District Court (R. 10-15) and the Court of Appeals (R. 112-121).

ARGUMENT

This case warrants no further review. It is controlled by *Commissioner v. Flowers*, 326 U.S. 465, with which the decision below is in complete accord.

1. The *Flowers* case held that expenses incurred in traveling are deductible under Section 23(a) (1), Appendix, *infra*, only if the employer's business forces the taxpayer to travel, and to live temporarily some place other than where employed, thereby advancing the interests of the employer. The expenses were here incurred not even to travel but were merely the taxpayer's personal expenses in Washington, D. C. (and Atlanta, Georgia) stemming from his Government employment.¹ Such expenses are expressly made non-deductible by Section 24(a) (1) of the Internal Revenue Code, Appendix, *infra*. Moreover, even if not regarded as personal living expenses they were not incurred in the pursuit of the business of the taxpayer's employer, the Government. As this Court said in the *Flowers* case (p. 473), whether he maintained "one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same". Despite the taxpayer's elaborate attempt to distinguish that case, the decisive fact is that these were personal expenses and had no connection with the business of his employer.

The alleged conflict between the holding below in this case and *Wallace v. Commissioner*, 144 F. 2d 407 (C.A. 9th); *Coburn v. Commissioner*, 138

¹ The claims for refund, which the court below correctly held to define the issue (R. 115-117), read as follows (R. 77, 85): "Living expenses incurred by reason of having to maintain separate residence in Washington, D. C., as a result of being employed by Office of Price Administration, was not deducted".

F. 2d 763 (C.A. 2nd); and *Flowers v. Commissioner*, 148 F. 2d 163 (C.A. 5th), does not exist. The court below made no attempt to define the term "home" or to apply principles inconsistent with those found in the cases which are allegedly in conflict. The decision below was based solely on "the facts and circumstances disclosed by the record in the instant case" (R. 118), and the court held that it could not say that the trial court's finding that the taxpayer's home was in Washington, D. C., was clearly erroneous. Accordingly, the case turns on its particular facts and does not define the term "home" any more than this Court did in the *Flowers* case, p. 472, wherein the question was expressly reserved.

2. The taxpayer's request (Pet. 34) for a remand to the District Court for a determination of the period during which the taxpayer's employment was "temporary" raises a question wholly restricted to this case and does not warrant the intervention of this Court. Moreover, no basis for the remand exists since the taxpayer offered no evidence whatever from which it could be determined when his employment ceased being "temporary" and became "indefinite" or on the further question of how much of the expenses claimed were allocable to the "temporary" period.

3. The taxpayer's view that the Court of Appeals below ignored the alternative issue based on Sec-

tion 23(a)(2), Appendix, *infra*, is erroneous. The court specifically stated (R. 121) that it had "considered all the other contentions of" the taxpayer but thought them to be without merit. This can no more be construed as a disregard of the issue than would a *per curiam* affirmance without opinion. Moreover, the taxpayer's argument on this issue is clearly without merit. Expenses of the type sought to be deducted are allowable if they are properly attributable to the taxpayer's business. Section 23(a)(2) was enacted to allow deductions to taxpayers who were not conducting a business but were incurring expenses in producing income. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 74-75 (1942-2 Cum. Bull. 372, 410, 429-430); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 87-88 (1942-2 Cum. Bull. 504, 570-571). The taxpayer, of course, makes no claim that these expenses were incurred in such connection, but places his reliance on the alleged necessity for the expenditures in carrying on his second "business", i.e., his Government employment. Section 23(a)(2) is therefore clearly inapplicable. *McDonald v. Commissioner*, 323 U. S. 57, 62. In any event, it was certainly not intended to diminish the scope of Section 24(a)(1) which disallows personal living expenses of the kind here under consideration.

CONCLUSION

The decision below is correct. There is no conflict and no need for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) [as amended by Sec. 127(b) of the Revenue Act of 1942, *supra*] *General Rule*.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);

* * * * *

(26 U.S.C. 1946 ed., Sec. 24.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(a)-1. *Business Expenses*.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under sections 23(b) to 23(z), inclusive, and the regulations thereunder. * * * Among the items included in business expenses are management expenses, commissions (but see section 29.24-2), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see section 29.23(a)(2)) * * *. As to items not deductible under any provision of section 23, see section 24.

SEC. 29.23(a)-2. *Traveling Expenses*.—Traveling expenses, as ordinarily understood,

include railroad fares and meals and lodgings. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals and lodging, are business expenses.

* * * * *

SEC. 29.23(a)-15. *Nontrade or Nonbusiness Expenses.*—(a) *In general.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23(a)(2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

* * * * *

(b) Except for the requirement of being incurred in connection with a trade or business, a deduction under this section is subject to all the restrictions and limitations that apply

in the case of the deduction under section 23(a)(1)(A) of an expense paid or incurred in carrying on any trade or business. This includes restrictions and limitations contained in section 24. * * *

* * * * *

Among expenditures not allowable under section 23(a)(2) are the following: Commuters' expenses; * * * and expenses such as expenses in seeking employment or in placing oneself in a position to begin rendering personal services for compensation * * *.